S. KULASINGAM & ANOR. v. COMMISSIONER OF LANDS, FEDERAL TERRITORY & ORS.

[F.C. (Syed Othman F.J., Mohamed Azmi & Abdoolcader JJ.) November 6, 1981 & January 11, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 176 of 1981]

Administrative Law — Declaration — Land acquisition — Compulsory acquisition — Whether there is a right of pre-acquisition hearing — Whether acquisition in accordance with law — Natural Justice — Justiciability of public purpose — Failure to make note of intended acquisition on register document of title — Whether provision mandatory or directory — Land Acquisition Act, 1960, ss. 3, 8 & 9 — Federal Constitution, art. 13.

Constitutional Law — Right to property — Compulsory acquisition of land — No pre-acquisition hearing — Whether acquisition in accordance with law — Federal Constitution, art. 13.

Land Law — Land acquisition — Right to pre-acquisition hearing — Justiciability of public purpose — Failure to make note of intended acquisition on register document of title — Whether provision mandatory or directory — Land Acquisition Act, 1960, ss. 3, 8 & 9.

In this case a piece of land vested in the first appellant as trustee for and on behalf of the second appellant, the Tamilian's Physical Culture Association, was acquired for a public purpose, that is for the purpose of building a hockey stadium. The land was held subject to the Special Condition that it was to be used for the erection of buildings and for a recreation ground for the purposes of the Association, but various public sporting events had in fact been held there. The appellants applied to the High Court for declarations to impugn the validity of the acquisition but the application was dismissed. The appellants appealed to the Federal Court and the appeal was argued on four grounds namely —

(1) that there is a right of a pre-acquisition hearing under the Act in consonance with the rules of natural justice;

(2) in the alternative, that Article 13(1) of the Federal Constitution would render any law providing for deprivation of property without a hearing invalid;

(3) that the question of public purpose is justiciable and the present user of the land already constitutes use for a public purpose and so negates any requirement for compulsory acquisition and that the purported acquisition of the land under section 3 would amount to deprivation of property which is confiscatory in nature;

(4) that the failure to comply with the provisions of section 9(1)(b) which are mandatory and not directory vitiated the acquisition purported to have been effected.

Held: (1) there is nothing in the legislation imposing any obligation for a pre-acquisition hearing in marked contrast to the specific provisions for an inquiry and hearing in respect of the quantum of compensation payable;

(2) the acquisition could not be impugned on any ground of natural justice since the legislation imposed no obligation for any inquiry and hearing in respect of the acquisition. The legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees and Article 13(1) of the Federal Constitution in no way vitiates the provisions of the Land Acquisition Act, 1960, in this regard;

(3) the purpose of the acquisition can be questioned but only to the extent that it be shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated does not come within section 3 of the Land Acquisition Act, 1960 or if bad faith is established. In this case even if public sporting events had been held on the land this did not constitute user for a public purpose as the use was at the discretion of the association and subject to the payment of fees. Therefore the land could be acquired for the public purpose stated;

(4) the provisions of section 9(1)(b) of the Land Acquisition Act are directory and not mandatory as its purpose is in substance also covered by the publication of the declaration in the *Gazette*. The omission had been rectified and the necessary notation of the intended acquisition made on the register document of title.

Cases referred to:-

(1) *Lai Tai* v. *Collector of Land Revenue* [1960] M.L.J. 82.

(2) *Sarawak Electricity Supply Corp.* v. *Wong Ah Suan* [1980] 1 M.L.J. 65, 67.

(3) *Ketua Pengarah Kastam* v. *Ho Kwan Seng* [1977] 2 M.L.J. 152, 154.

(4) *Comptroller-General of Inland Revenue* v. *N.P.* [1973] 1 M.L.J. 165.

(5) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64, 71; [1981] A.C. 648.

(6) *State of Bihar* v. *Kameshwar Singh* A.I.R. 1952 S.C. 252.

(7) *Charanjit Lal* v. *Union of India* A.I.R. 1951 S.C. 41.

(8) *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155.

(9) *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor.* v. *Government of the State of Johore* [1979] 1 M.L.J. 49.

(10) *Wijeyesekera* v. *Festing* A.I.R. 1919 P.C. 155.

(11) *SMT. Somavanti & Ors.* v. *State of Punjab & Ors.* [1963] 2 S.C.R. 774.

(12) *Rajnarain Singh* v. *Chairman P.A. Committee* A.I.R. 1954 S.C. 569, 574.

(13) *Pow Hing & Anor.* v. *Registrar of Titles, Malacca* [1981] 1 M.L.J. 155, 157.

(14) *London & Clydeside Estates Ltd.* v. *Aberdeen District Council & Anor.* [1980] 1 W.L.R. 182, 189.

(15) *Mukta Ben & Anor.* v. *Suva City Council* [1980] 1 W.L.R. 767, 779.

(16) *Pahang South Union Omnibus Co. Berhad* v. *Minister of Labour and Manpower & Anor.* [1981] 2 M.L.J. 199.

(17) *Merdeka University Berhad* v. *Government of Malaysia* [1981] 2 M.L.J. 356.

(18) *Regina* v. *Raymond* [1981] 3 W.L.R. 660, 670; [1981] 2 All E.R. 246.

(19) *Ezra* v. *Secretary of State for India in Council & Ors.* (1905) 32 I.A. 93.

(20) *Government of Malaysia & Anor.* v. *Selangor Pilot Association* [1977] 1 M.L.J. 133, 135; [1978] A.C. 337, 347.

(21) *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660, 679.

(22) *Brettingham-Moore* v. *Municipality of St. Leonards* (1969) 121 C.L.R. 509, 524.

(23) *Hutton* v. *Attorney-General* [1927] 1 Ch. 427.

(24) *Ng Yit Seng & Anor.* v. *Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.* [1981] 2 M.L.J. 194, 195.

HIGH COURT.

C.V. Das (*John Gurusamy* with him) for the plaintiffs.

Dato Abu Mansor bin Ali, Senior Federal Counsel (*Lim Heng Seng*, Federal Counsel, with him) for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: This is an application for a number of declarations which if granted will have the effect of rendering all proceedings taken by the defendants under the Land Acquisition Act, 1960 null and void. A brief summary of the background facts may be necessary.

The first plaintiff is the sole surviving trustee of the land described in the document of title Grant No. 6444 Lot 5 section 42 in the town of Kuala Lumpur. The second plaintiff is a registered society under the Societies Act, 1966 which is principally a sporting and cultural body. It is also said to be one of the oldest sporting clubs in this country bearing the name of

Tamilians' Physical Culture Association (T.P.C.A.) formed in 1914. The said land was a grant from the Sultan of Selangor to the T.P.C.A. made on March 5, 1915 and was expressly granted for use of the T.P.C.A. as a recreational ground. The land is approximately 5 acres in area and situated at the junction of Jalan Raja Muda and Jalan Doctor Latiff and surrounded by residential and institutional buildings namely the General Hospital and the Medical Research Centre.

The said land has been used as a sports stadium with a turfed hockey cum football field, two tennis courts and terraced stadium seating. A two storey brick clubhouse also stands on the said land. The stadium can accommodate about 7,000 spectators and in fact has been the venue for several international sporting events including the Third World Cup for Hockey in 1975 and the Inter-Continental Hockey Meet recently.

There are many other sports clubs in Kuala Lumpur for example the Suleiman Club, the Kilat Club, the Royal Selangor Golf Club to mention only a few but of these only the Merdeka Stadium is operated by the Government. It would appear that all the other sporting clubs are for members' use only except the T.P.C.A. Club and a few others which also cater for the public generally. Therefore the T.P.C.A. is indeed a sporting club used by people of all races and walks of life. It is stated in the affidavit of the honorary secretary of the T.P.C.A. sworn on August 27, 1981 that the T.P.C.A. stadium caters for the sporting and recreational facilities of the public generally. The plaintiffs also contend that it is in a better position to cater for the public than the Merdeka Stadium. It is also emphasised by the plaintiffs that the T.P.C.A. membership is multi-racial and it has a total of 606 members with associate membership of 87 Chinese, 123 Malays, 44 Indians and 11 others.

By *Gazette* Notification No. 2983 dated May 21, 1981 the Government commenced proceedings to acquire the said land under the Land Acquisition Act, 1960. The acquisition was stated expressly to be for "the purpose of building a hockey stadium." The Government then proceeded with the various steps provided for under the said Act and had in fact served certain forms of notices on the plaintiff namely Forms E, F, K and I, under the said Act. The Collector of Land Revenue had also fixed the date of hearing of the claims for compensation on July 29, 1981.

However, when the plaintiffs took out summons-in-chambers for an interim injunction on July 24, 1981 the defendants discovered that neither the Collector of Land Revenue nor any other authority had made a notation of the intended acquisition on the said title as required under the Land Acquisition Act, 1960. This in fact was verified by the affidavit of John R. Gurusamy dated July 24, 1981 who made an official search of the document of title in the Land Office concerned. Subsequently the Assistant Collector of Land Revenue brought the matter to the attention of the Registrar of Titles of the Federal Territory who then entered a note of the intended acquisition on the register of titles of the said land on July 28, 1981.

The defendants maintain firmly in their affidavits that there is an immediate public need for an astro-turfed playing field of international standards to enable Malaysia to be the venue for future international hockey meets and tournaments. It is reiterated in the affidavit of the Secretary-General of the Ministry of Culture, Youth and Sports dated August 20, 1981 that in fact Malaysia will need such a facility for the venue of the 2nd International World Youth Hockey Tournament scheduled to be held in August 1982.

It does not seem to be seriously disputed that the Government at present owns only two public sporting facilities namely Stadium Merdeka and Stadium Negara managed by a corporation set up by an Act of Parliament. Thus the Government has in fact decided to construct a stadium with a synthetic surface (astro-turfed) playing field designated primarily for hockey tournaments. The Secretary-General of the Ministry also affirmed that the Government is continuously looking for suitable sites for the purpose of expanding facilities for recreational and sporting activities of the general public and stated that although the proposed stadium will be primarily designed for hockey it will also be made available for a variety of other sporting activities such as softball, football etc.

The plaintiffs raised a number of issues of constitutional importance one or two of which I must admit, did cause some anxiety. For the sake of brevity I will set out these points according to their importance.

Firstly, the plaintiffs complained that they were not afforded the right of hearing before the authority made the decision to acquire the land. This hearing was referred to by counsel as "the pre-acquisition hearing". It was argued that even if the statute is silent on this right of hearing the defendants misapplied section 3 of the Land Acquisition Act, 1960 by denying the plaintiffs that right of pre-acquisition hearing. Thus it was argued that since the right of property is one of the hall-marks of democracy and the *audi alteram partem* rule is the corner stone of justice the right of hearing only on matters of compensation as provided by the Act is not sufficient.

Secondly, it was argued on behalf of the plaintiffs that section 3 of the Land Acquisition Act, 1960 is not consistent with Article 8(1) of the Federal Constitution in that section 3 of the Act fails to provide any guidelines on policy or principle as to how the choice or selection of the land is to be made by the acquiring authority to satisfy the required purpose. This omission therefore infringes the equality provision of the Constitution.

Thirdly, it was also argued that the purpose declared in the acquisition of the said land is not "public purpose" within the meaning of section 3 of the Act because it could never have been the intention of the Act to allow the Government to acquire a land for a purpose which is the very same purpose for which the land is currently being used.

Fourthly, it was also contended by the plaintiffs that the Federal Territory (Modification of Land Acquisition Act, 1960) Order, 1974 is null and void be-

cause it purports to legislate whereas the legislative authority of the Federation is vested only on Parliament by virtue of Articles 44 and 66 of the Federal Constitution. Section 6(4) of the Constitution (Amendment) (No. 2) Act of 1973) is also challenged as being void for excessive delegation. Therefore the plaintiffs contend that even if the court holds that the Modification Order of 1974 is valid on the face of it, it is still bad as the source of the power is bad being *ultra vires* Articles 44 and 66 of the Constitution and therefore null and void and of no effect.

Lastly, it was also argued that the failure of the second defendant to comply with section 9(1) of the Land Acquisition Act, 1960 to make a note of the intended acquisition in the register document of title renders the entire acquisition proceedings under the Act, null and void and of no effect.

My conclusions on the challenges are as follows.

Must the acquiring authority afford to the owner of land proposed to be acquired an opportunity to be heard before commencing proceedings to acquire the land?

It is necessary to look first at the relevant provisions of the Federal Constitution and of the Land Acquisition Act, 1960. Article 13 of the Constitution reads as follows: —

"13. *Rights to property.*

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."

Section 3 of the Land Acquisition Act, 1960 reads as follows:

"3. The State Authority may acquire any land which is needed —

(a) for any public purpose;

(b) by any person or corporation undertaking a work which in the opinion of the State Authority is of public utility; or

(c) for the purpose of mining or for residential, agricultural, commercial or industrial purposes."

The only local case which mentioned the procedural right of hearing in a land acquisition proceeding is the case of *Lai Tai* v. *Collector of Land Revenue*.[1] This case dealt with the Land Acquisition Enactment (Cap. 140), the precedessor to the present Land Acquisition Act, 1960. But the Constitution provision was the same. The application before the judge then was for enlargement of time to enable the applicant to apply to the Collector requiring the matter to be referred to the court under the relevant provisions of the Enactment. At page 85 of the judgment Adams J. said:

"Article 13 of the Constitution of the Federation of Malaya demands that no person shall be deprived of his property except in accordance with the law. It is essential that the intention as well as the provisions of the enactment be observed. It is a matter of natural justice that before property is taken compulsorily and compensation fixed, the owner should be made aware of the proceedings, where it is humanly possible to do so, so that he may be heard."

It is to be observed, firstly, that in the context of the whole judgment the judicial pronouncement is merely *obiter*. Secondly, in that case the judge held that non-service of the notice on the owner of the land acquired was only an irregularity which did not invalidate the acquisition.

On behalf of the plaintiffs, *Sarawak Electricity Supply Corpn.* v. *Wong Ah Suan*[2] was relied on where the Federal Court reiterated the principle for an opportunity to be heard by the party affected or likely to be affected by any administrative or executive action. *Ketua Pengarah Kastam* v. *Ho Kwan Seng*[3] was also cited where the Federal Court examined the rule requiring a fair hearing. In the latter case the judgment of Raja Azlan Shah F.J. (as he then was) at page 154 examined the history of that rule. He concluded thus:

"In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing."

The plaintiffs here also argued that if the court holds that the Land Acquisition Act, 1960 does not require the pre-acquisition hearing then the court is bound to hold that the Act is unconstitutional because Article 13(1) of the Federal Constitution says that no person shall be deprived of property save in accordance with "law" and the word "law" is defined in Article 160(2) to include the common law.

The words "save in accordance with law" appear twice in our Constitution namely in Article 5(1) relating to liberty of the person and Article 13(1) relating to deprivation of property.

Article 13(1) in my opinion ensures the sanctity of private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the Executive but that he may be deprived of his property only in accordance with law. In my view the proper interpretation of the word "law" is not as in *Comptroller-General of Inland Revenue* v. *N.P.*[4] which is with respect, too restrictive, but as interpreted in *Ong Ah Chuan* v. *Public Prosecutor*[5] in the judgment of the Privy Council dealing with the very same words "in accordance with law" appearing in a provision of the Singapore Constitution, where Lord Diplock at page 71 said:

"In a constitution founded on the Westminister model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery."

The interpretation of the word "law" or the words "in accordance with law" may be relevant in consi-

dering clause (1) of Article 13 of the Constitution. But in my opinion it is really on clause (2) of that Article that our present case revolves. Therefore it is at clause (2) of Article 13 that we have to look closely.

To get our perspective right it is necessary to begin with that in considering Article 13 of our Constitution regard must be had to the distinction between the provision of clause (1) and clause (2) of that Article. Clause (1) speaks of "deprivation" and clause (2) speaks of "compulsory acquisition or use". The corresponding provision in the Indian Constitution although not identically worded is Article 31. Before the Constitution (Amendment) Act of 1955 which amended the Indian provision there was no clear distinction between "deprivation" and "acquisition". Before the amendment the decisions of the Indian Courts produced at best a state of uncertainties on the meaning of Article 31 of the Indian Constitution.

It was then made clear that compensation would not be payable in any case coming under clause (1) of Article 31 not being a case of acquisition or requisitioning. Thus *Basu* on Commentary on the Constitution of India, 5th Edn. at page 190 says:

"At the same time, the amendment of 1955 made it clear that clauses (1) and (2) dealt with two different subjects and that 'acquisition' and 'requisitioning' did not come within Clause (1). It followed therefore that Clause (1) dealt with cases of deprivation of property *otherwise* than by acquisition and requisitioning."

The drafters of the Merdeka Constitution in 1957 in which Article 13 first appeared must have considered this distinction between "deprivation" and "acquisition" in the Indian Constitution then and they separated the guarantees in clauses (1) and (2) of the Article which in fact cover two separate constitutional protections. The word "law" followed by the words "shall provide" in clause (2) can only mean enacted law. What can clearly be drawn from clause (2) of Article 13 of our Constitution expressly and by necessary implication are the following constitutional propositions: —

(1) Private property can be compulsorily acquired or used (by the State);

(2) Private property cannot be so acquired or used except on payment of adequate compensation; and

(3) Private property cannot be so acquired or used except by authority of an enacted law.

The study of Article 13 is not complete without considering also the character and content of clause (2) of Article 13 and the Land Acquisition Act, 1960 which flows from that clause. As stated earlier, Article 13 as a whole preserves the sanctity of private property but clause (2) of that Article allows certain inroads into that general right. A justification for the inroads and the rationale in clause (2) is to be found in the doctrine of *salus populi suprema lex* — the interests of the public are paramount, and that private interests may in some circumstances be subordinated to the higher interests of the public, when the State thinks it is proper to do so. "The exercise of such power (power of compulsory acquisition of private property by the State) has been recognised in the jurisprudence of all civilized countries as conditioned by public necessity and payment of compensation" so observed by Patanjali Sastri C.J., in *State of Bihar* v. *Kameshwar Singh.*[6] In *Charanjit Lal* v. *Union of India,*[7] B.K. Mukherjea J., observed as follows:

"It is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. This right, which is described as eminent domain, in American law, is like the power of taxation, an offspring of political necessity and it is supposed to be based upon an implied reservation by Government that property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner."

The Land Acquisition Act, 1960 is a consolidation of previous enactments on compulsory acquisition of land. All these statutes were based on the Indian precedents. The Indian Lands Act 1894 did not provide for any pre-acquisition hearing until the amendment made to the Act in 1923 which added the new section 5A. Thus under the Indian Act before the 1923 amendment the wishes of the owners of the land acquired were wholly irrelevant as the Act did not contain any provision for any objection on the part of the owner to the acquisition itself. This is exactly the case of our Land Acquisition Act, 1960. Objections are only limited to the amount of compensation and matters connected therewith. On a proper reading of Article 13(2) of our Constitution therefore it is my view that a pre-acquisition hearing is not required by the Constitution either expressly or by implication. What is required is a provision for adequate compensation. The Constitution is the supreme law of the land and where the Constitution itself does not provide for a right the court cannot by itself incorporate the right into the Constitution.

Is section 3 of the Land Acquisition Act, 1960 inconsistent with Article 8(1) of the Federal Constitution?

It was argued on behalf of the plaintiffs that section 3 of the Land Acquisition Act, 1960 is *ultra vires* the Constitution and therefore null and void and of no effect on the grounds that section 3 of the Act fails to provide any guideline or policy in the exercise of the discretion of the acquiring authority.

Article 8(1) of the Constitution provides that all persons are equal before the law and entitled to equal protection of the law. The law on "equality" and "equal protection" was exhaustively dealt with by the Federal Court in *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor.*[8] In his judgment the Lord President Tun Suffian went into all the Indian authorities extensively and came to a number of conclusions at pages 165 to 166 of the judgment. One of the conclusions is that the equality provision is not absolute and it does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. The other conclusion is that in considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy. The Federal Court was asked to make a declaration whether section 418A of the Criminal Procedure Code is constitutional. The Federal Court held that that section of the Criminal Procedure Code is not discriminatory

since although it uses the words "any particular case" it does not apply specifically to the particular case against the accused and that section applies to all cases triable in a subordinate court.

One thing seems clear when we talk of equality and equal protection of the law. What the equality clause is intended to strike at are real and substantial disparities, substantive or procedural, arbitrary or capricious actions of the Executive and it would be contrary to the object and intendment of the equality clause, to borrow the words of an Indian judge "to exhalt delicate distinctions, shades of harshness and theoretical possibilities of prejudice into legislative inequality or executive discrimination."

Section 3 of the Land Acquisition Act says the State Authority may acquire *any land* which is needed for any *public purpose*. It does not provide for the acquisition of any land for *any purpose*. The purpose of the acquisition being no other than the purpose specified in paragraph (a) or as specified in paragraph (b) or (c) of section 3 provides sufficient guidelines required to make the provision non-discriminatory. Therefore it is my view that section 3 of the Land Acquisition Act, 1960 is not inconsistent with Article 8(1) of the Constitution.

Is the purpose of the present acquisition "public purpose"?

Article 31 of the Indian Constitution expressly mentions "public purpose". The 5th amendment to the American Constitution mentions the words "public use" in the guarantee that private property shall not be taken for "public use" without just compensation. Clause (2) of Article 13 of our Constitution does not mention either the words "public purpose" or "public use". Why the words "public purpose" are used in the Indian Constitution can perhaps be explained by the fact that Article 31 of the Indian Constitution was drafted closely following section 299 of Government of India Act 1935. The words "public use" in the American Constitution can perhaps be explained in the context of the declaration of the guarantee where the words "private property" were used as opposed to "public property".

The expression "public purpose" is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the textbooks have done is to suggest the tests to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple commonsense test, that is, to see whether the purpose serves the general interest of the community.

The challenge of the plaintiffs on this point, however, can be fully answered by the judgment of the Privy Council in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor.* v. *The Government of the State of Johore*[9] where the Privy Council in dismissing the appeal held that section 8(3) of the Land Acquisition Act, 1960 provides that the declaration issued under the section shall be conclusive evidence that all the scheduled land is needed for the purpose specified therein. The judgment of Viscount Dilhorne would seem to reaffirm *Wijeyesekera* v. *Festing*[10] and *SMT. Somavanti & Ors.* v. *The State of Punjab & Ors.*,[11] on the matter of the Government declaration of public purpose but the judgment also goes one step further in providing for the circumstances when the courts can treat such declaration as a nullity.

It would seem to be the plaintiffs' contention also in this case that since the purpose intended by the acquiring authority is the same as the purpose for which the T.P.C.A. Stadium is currently being used, therefore the purpose cannot have been the purpose intended by the Land Acquisition Act, 1960. I confess that I am unable to see how this argument can succeed since even assuming for a moment that the T.P.C.A. is in a position to provide similar facilities, the public purpose intended by the acquiring authority does not cease to be a public purpose merely because the plaintiffs allege that the purpose the T.P.C.A. Stadium is being used for now is as good a public purpose as intended by the acquiring authority. The Government with all the expertise and funds at its disposal will surely be in a much better position than the plaintiffs, as a private club, to cater for the needs of the public in providing sporting and recreational facilities intended by the acquisition.

Are the Constitution (Amendment) (No. 2) Act 1973 and the Federal Territory (Modification of Land Acquisition Act 1960) Order 1974 valid laws?

The Constitution (Amendment) Act referred to was an Act to amend the Federal Constitution to make provisions for the establishment of the Federal Territory and for the allocation of members of the House of Representatives by States and for matters connected therewith. This amendment was made by the authority of Article 159 of the Constitution itself which requires the Act to be passed by both Houses of Parliament and supported on the 2nd and 3rd readings by votes of not less than 2/3 majority.

Section 6(4) of the Constitution (Amendment) (No. 2) Act reads as follows: —

"(4) The Yang di-Pertuan Agong may, whenever it appears to him necessary or expedient so to do whether for the purpose of removing difficulties or in consequence of the passing of this Act, by order make such modifications to any provisions in any existing laws as he may think fit."

The words "as he may think fit" appearing at the end of subsection perhaps prompted plaintiffs to suggest that the subsection gives too wide and unfettered a discretion to the Yang di-Pertuan Agong. His Majesty in this case it may be pointed out, is merely to make such modifications which appear to him necessary or expedient either for the purpose of removing administrative difficulties or modification of such consequential nature necessitated by the establishment of the Federal Territory. The discretion given is clearly limited to these types of modifications. For the proper construction of that subsection the words "as he may think fit" can safely be ignored.

Another argument canvassed to challenge this subsection was that it purports to create a rival legislative authority and therefore infringes Articles 44 and 66 of the Constitution which vest legislative authority only on Parliament. This again is in my view a miscon-

ceived argument. There is nothing to prevent Parliament from delegating power to legislate on minor and administrative matters and for this very reason we have in addition to statutes innumerable subordinate or subsidiary legislation having the force of law. Without these subordinate or subsidiary legislation the Government machinery will not be able to function efficiently. Delegation in the nature of section 6(4) of the Constitution (Amendment) (No. 2) Act 1973 is a normal legislative device today. Parliament is supreme subject only to the Constitution. Acts of Parliament are the direct acts of the supreme legislative body of the country; delegated legislation are laws made under authority of Acts of Parliament. Under the modern system of Government it is nonsense to say that by this device the legislation creates a rival legislature because it is an established rule that a subsidiary legislation is still subject to the doctrine of *ultra vires* in relation to the enabling legislation and therefore still within the control of the courts. In this case Parliament in its wisdom and acting on a 2/3rd majority decided to delegate to the Yang di-Pertuan Agong the power to make those necessary modifications to the laws applicable to the Federal Territory so that the day-to-day administration of the Federal Territory can be carried out smoothly.

The word "modification" has been accepted to mean an amendment which does not involve any change of policy but confined merely to alterations of such character which keep the policy of the statute intact and produce only such changes as are appropriate to existing conditions — see also judgment of the Indian Supreme Court in *Rajnarain Singh* v. *Chairman P.A. Committee.*[12] As can be seen clearly the Federal Territory (Modification of Land Acquisition Act 1960) Order 1974 which appears as P.U.(A) 81/74 deals only with references to "State Authority" and other references in relation to administrative machinery in the Land Acquisition Act, 1960 to enable the Act to be implemented in the Federal Territory. There is no change in policy whatsoever. There is no creation of a rival legislature. There is no abdication of legislative authority. Therefore it is clear that both the Constitution (Amendment) (No. 2) Act 1973 and the Modification Order 1974 are valid laws.

Was there a failure to comply with section 9(1) of the Land Acquisition Act, 1960?

As referred to earlier in the judgment, Forms E, F, K and I under the said Act were issued long before the annotation was made by the Registrar of Titles. Section 10(1) of the Act provides that the Collector shall having completed the action required by section 9 commence proceedings for the acquisition of the land by giving public notice in Form E. Section 9(1) requires the Collector or other registering authority, upon the publication pursuant to section 8 of Form D, to make note of the intended acquisition in the register document of title. Having regard to section 8(3) of the Act which provides that a declaration in Form D shall be conclusive evidence that the land is needed for the purpose specified and that Form D is required by section 8(1) to be published in the *Gazette* (for information of the public at large) I am not inclined to the view that provision of section 9(1)(b) of the Land Acquisition Act is mandatory. The purpose of the annotation is merely to inform *others* (that is persons other than the owner) and therefore the provision is at best directory and therefore failure to comply with it does not invalidate the acquisition proceeding.

Looking at the facts of this case however it would seem to me that the wording of section 10(1) of the Act takes away the necessity for a ruling at all in this case whether the provision of section 9(1) of the Act is mandatory or directory. The facts disclosed in the affidavits show that the acquiring authority had retraced their steps and had in fact made the annotation required by law and thus they should in my opinion be regarded as having proceeded with the issue of Forms E, F, K and I afresh. Even if the provision of section 9(1)(b) is considered mandatory the language used in section 10(1) of the Act would seem to be addressed only to the steps to be taken after the issue of Form D. In other words even if there is a failure to comply with section 9(1) Form D still remains valid.

Pow Hing & Anor. v. *Registrar of Titles, Malacca,*[13] is distinguishable as it involved the validity of a purported forfeiture of land by the Collector of Land Revenue. It was held that the Collector had failed to comply with the mandatory provisions of sections 97(2) and 100 of the National Land Code and therefore the purported forfeiture was set aside. The judgment of Lord Hailsham in the House of Lords in *London & Clydeside Estates Ltd.* v. *Aberdeen District Council & Anor.*[14] cited in *Pow Hing* provides a useful guideline or approach in a situation of this nature. At page 189 the following appears:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. ... At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. ... At the other end of the spectrum the direction in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint."

In my view the failure of the registering authority in this case to make the annotation earlier cannot render the entire proceedings for acquisition null and void.

All declarations refused. Application dismissed with costs.

From the above judgment the applicants appealed to the Federal Court.

FEDERAL COURT.

Raja Abdul Aziz Addruse (*C.V. Das* and *John Gurusamy* with him) for the appellants.

Dato Abu Mansor bin Ali, Senior Federal Counsel (*Lim Heng Seng,* Federal Counsel, with him) for the respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): This appeal involves the question of the validity of the compulsory acquisition for a public pur-

pose of some 5 acres of land comprised in Lot 5 section 42 in the Town of Kuala Lumpur held under Grant No. 6444 and vested in the first appellant as the sole surviving trustee for and on behalf of the second appellant ('the Association'), a society registered under the Societies Act, 1966, pursuant to the provisions of the Land Acquisition Act, 1960 ('the Act') for the construction of a hockey stadium for the Ministry of Culture, Youth and Sports. The land in question according to the first of the special conditions of title in the Grant is to be used solely for the erection of a building or buildings and for a recreation ground for the purposes of the Association but on the affidavit evidence it appears that various public sporting events have also been held there. To avoid repetition and as we are primarily concerned with the Act, all references to statutory provisions in this judgment will be to the Act unless otherwise specifically indicated.

The brief facts of the matter are that the Land Executive Committee of the Federal Territory of Kuala Lumpur, acting under the powers delegated to it by the Yang di-Pertuan Agong, had decided on April 24, 1981 on the compulsory acquisition of the land in question for the purpose we have referred to and initiated the requisite process in implementation thereof. The first respondent accordingly caused to be published in the Federal Government *Gazette* of May 21, 1981 the necessary declaration in Form D under section 8 and this was followed by the other consequential statutory notices and a certificate of urgency with regard to possession. There was however failure to comply with the provisions of section 9(1)(b) regarding notation but as soon as this was discovered the omission was rectified and the necessary notation of the intended acquisition made on the register document of title on July 28, 1981.

The appellants took out a summons on July 24, 1981 to impugn the validity of the acquisition and claimed a series of declarations on several grounds to this effect but Hashim Yeop A. Sani J., in a reserved judgment delivered on September 11, 1981 refused all the declarations sought. The appellants then appealed to us against this order but abandoned some of the grounds previously relied on and the appeal was argued on four grounds, namely:

(1) that there is a right of a pre-acquisition hearing under the Act in consonance with the rules of natural justice;

(2) in the alternative, that Article 13(1) of the Federal Constitution would render any law providing for deprivation of property without a hearing invalid;

(3) that the question of public purpose is justiciable and the present user of the land already constitutes use for a public purpose and so negates any requirement for compulsory acquisition and that the purported acquisition of the land under section 3 would amount to deprivation of property which is confiscatory in nature;

(4) that the failure to comply with the provisions of section 9(1)(b) which are mandatory and not directory vitiated the acquisition purported to have been effected.

Before proceeding to consider the four issues raised we should perhaps make some observations on two matters which have neither been raised nor considered at any stage of these proceedings hitherto. First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act and section 9(c) thereof specifically provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that that is so, then we would think that if it was at all necessary for the Association to sue jointly as a plaintiff a representative claim by one or more of its office-bearers on behalf of all the members would be the solution. In any event the competent person to sue in this matter is the first appellant as the surviving trustee in whom the land is vested.

Second, no consideration appears to have been given hitherto to the special conditions of title in the Grant. The first of these which we have already referred to specifically provides that the land is to be used solely for a recreation ground for the purposes of the Association. It would therefore appear that any public user hitherto would be in breach of the conditions of title. This aspect would also have a material bearing on the third issue raised on behalf of the appellants with regard to the question of public purpose and the present user of the land. The second special condition of title provides that if at any time the Association shall cease to use the land for the purposes for which it is granted the Collector may resume the land. The third special condition specifically empowers resumption of the land on payment of the value of the buildings and improvements only if at any time the land is required for any public purpose. This again would appear to cut across the third issue raised by the appellants. The relevant authorities have however chosen to proceed under the Act and we accordingly have to consider the matter on that basis but having due regard to the relevance and pertinence of the special conditions we have adverted to in relation to the points taken by the appellants.

The Issues Involved

Turning now to the issues arising for consideration:

(1) *Whether there is a right to a pre-acquisition hearing*

Considering the provisions and scheme of the Act, the short answer to this point is that there is nothing in the legislation imposing any such obligation in marked contrast to the specific provisions for an inquiry and hearing in respect of the quantum of compensation payable. This very point was taken before the Privy Council in *Mukta Ben & Anor.* v. *Suva City Council*[15] where it was contended *inter alia* that the requirements of natural justice were not observed but the Judicial Committee held (at page 779) that the acquisition could not be impugned on any ground of natural justice, since the legislation imposed no obligation to inform the appellants in that case that an application for compulsory acquisition was contemplated or to invite them to make representations to the Governor and that he had in no way acted unfairly in regard to them. The rules of natural justice vary in content and ambit according to the circumstances and context

(*Pahang South Union Omnibus Co. Berhad* v. *The Minister of Labour and Manpower & Anor.*;[16] *Merdeka University Berhad* v. *Government of Malaysia*[17]), and the English Court of Appeal in *Regina* v. *Raymond*[18] (at page 670) approved the proposition that the courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the *audi alteram partem* rule.

It is clear that any such right of a pre-acquisition hearing would stultify acquisition proceedings throughout the country and the scheme of the Act would appear in effect to specifically proceed on this basal premise. The Act is based on the Indian Land Acquisition Act, 1894 which however was amended in 1923 to give the landowner a pre-acquisition right of hearing; there is no such provision in our Act. The Privy Council held in *Ezra* v. *Secretary of State for India in Council & Ors.*[19] that section 40 of the Indian Land Acquisition Act, 1894, prescribing inquiry by the local Government as to whether a proposed acquisition is needed for a public purpose, does not on its true construction require the presence during that inquiry of the owner of the land, or entitle him to notice thereof.

We cannot therefore accept the argument advanced on this issue and find it to be devoid of merit.

(2) *Whether Article 13(1) of the Federal Constitution renders invalid the provisions of the Act empowering the deprivation of property without a hearing*

We regret we are unable to agree with the learned judge on his construction of the provisions of clauses (1) and (2) of Article 13 of the Constitution when he held that they are in effect mutually exclusive. The Privy Council decided in *Government of Malaysia & Anor.* v. *Selangor Pilot Association*[20] that Article 13 cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed as deprivation may take many forms which would naturally include acquisition or use but that those are not the only ways by which deprivation can be effected. We therefore have to consider the connotation of the term 'law' in Article 13(1) which stipulates that no person shall be deprived of property save in accordance with law. Lord Diplock in delivering the judgment of the Privy Council in *Ong Ah Chuan* v. *Public Prosecutor*[5] said (at page 670) that 'law' in such a context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution, referring to that of Singapore but this equally applies to similar written constitutions including ours. We should perhaps add that *Ong Ah Chuan*[5] dealt with the question of presumptions and burden of proof.

The legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees. In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in *Furnell* v. *Whangarei High Schools Board*[21] which concerned the disciplinary code for New Zealand government teachers. Charges against a schoolteacher were investigated by a sub-committee which reported to the high school's board. Neither the sub-committee nor the board gave the schoolteacher an opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at page 679) that it is not 'the function of the court to re-draft the code' and referring with approval to the decision of the High Court of Australia in *Brettingham-Moore* v. *Municipality of St. Leonards*[22] which held in effect (at page 524) that it is not for the court to amend the statute by engrafting upon it some other provision which it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material. As we have said earlier there is express provision in the Act for an inquiry and hearing in respect of the quantum of compensation payable but none with regard to the acquisition itself of land needed for the purposes specified in section 3. This attracts the application of the maxim '*expressio unius est exclusio alterius*' which has been used to exclude natural justice (*Hutton* v. *Attorney-General*[23]).

There has hitherto been no pre-existing right of hearing in respect of the acquisition *per se* under the precursors to the Act which it codified and consolidated and we are further fortified in our view by the amendment effected to the provisions of the Indian Land Acquisition Act of 1894 in 1923 for this purpose and also the provisions of section 8(3) which prescribe that a declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified.

In the light of the principles we have discussed we cannot but conclude that Article 13(1) of the Constitution in no way vitiates the provisions of the Act in this regard.

(3) *Justiciability of public purpose and the effect of the present user of the land*

The conclusive evidence clause in section 8(3) which we have mentioned in effect provides that the decision of the State Authority that the land is needed for the purpose specified under section 8(1) is final and conclusive and cannot be questioned (*Wijeyesekera* v. *Festing*[10]). The Privy Council however held in *Syed Omar Alsagoff & Anor.* v. *Government of the State of Johore*[9] (at page 50) that it may be possible to treat a declaration under section 8 as a nullity if it be shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated therein does not come within section 3 or if bad faith can be established. The purpose of the acquisition can therefore be questioned but only to this extent.

The appellants contend that the present user of the land already constitutes use for a public purpose and there can be therefore no requirement for compulsory acquisition for an identical purpose. We have in this connection earlier referred to the third of the special conditions of title which would appear to cut right across this argument, and if in effect there

has currently been a user of the land in question for public purposes, but we do not accept this, this would be unlawful and in breach of the conditions of title in the light of the first and third of the special conditions. In any event even if public sporting events have been held on the land this does not constitute user for a public purpose as the land hitherto was vested in a trustee for a private entity which is governed by its constitution and rules, and any use thereof for public sporting events would and must necessarily be at the discretion of the Association and subject of course to the payment of fees and other charges to it.

In the premises, *cadit quaestio* — the question falls.

(4) *Failure to comply with the provisions of section 9(1)(b)*

Section 9(1)(b) prescribes that upon the publication of the declaration in Form D pursuant to section 8 the Collector or other registering authority shall make a note of the intended acquisition under subsection 2(a) thereof upon the register document of title. Section 10(1) provides that the Collector shall, having completed the action required by section 9, commence proceedings for the acquisition of the land by giving public notice in Form E. In the matter before us the declaration in Form D under section 8 was gazetted on May 21, 1981 and Form E was issued on June 12, 1981 but the requisite notation under section 9(1)(b) on the register document of title was entered only on July 28, 1981. The argument posited by the appellants is that the provisions of section 9(1) are mandatory and failure to comply with them vitiated the acquisition purported to have been effected in view of section 10(1).

The issue accordingly revolves into the question as to whether the provisions of section 9(1) are mandatory or directory. We need only refer to *Pow Hing & Anor.* v. *Registrar of Titles, Malacca*[13] (at page 157) with regard to the connotation of this dichotomy, and applying the test laid down in the judgment of this court in that case for the distinction between mandatory and directory requirements in a statute and having regard to the conclusive evidence clause stipulated in section 8(3) and the fact that section 8(1) requires the declaration in Form D to be published in the *Gazette* for general information, we are of the view that the provisions of section 9(1)(b) are directory and not mandatory as its purpose is in substance also covered by the publication of the declaration in Form D in the *Gazette* under section 8(1).

This court has also in *Ng Yit Seng & Anor.* v. *Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.*[24] dealt (at page 195) with the doctrine of substantial compliance in regard to directory requirements. This has in our view been met in this case as there is no specific time limit stipulated in section 9(1) and the omission was in fact repaired and the requisite notation made some two months after the publication of the declaration in Form D. The question raised by this issue would moreover appear to be of academic interest as we are told by Senior Federal Counsel appearing for the respondents that Forms E and F were re-issued *de novo* after judgment in the High Court, and in any event what is in fact and in essence impugned is the acquisition purported to be effected by the publication of the declaration in Form D under section 8 which is the nub of the objection around which the case for the appellants revolves and not the subsequent proceedings for an inquiry as to claims to compensation.

Conclusion

For the reasons we have given and in the light of the law we have adumbrated we dismissed this appeal with costs at the conclusion of argument and directed the security lodged in court to be paid out to the respondents to account of their costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

THE "LOON CHONG"; THE "LOON CHONG" OWNERS & ORS. v. ENG HONG TRADING CO. SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) November 17, 1981 & January 16, 1982]

[Penang — Federal Court Civil Appeal No. 241 of 1980]

Shipping Law — Bareboat lease agreement — Beneficial ownership of ship — Monetary claim in respect of necessaries supplied to ship — Action in rem against ship — Whether maintainable.

In this case the respondents issued a writ for a monetary claim in respect of the appellant's ship "Loon Chong" and her sister ship "Loon Hsing" for goods in the nature of necessaries supplied on account of the two ships. The owners of the "Loon Chong" were Melbourne Plaza Navigation (Panama) S.A. and the owners of the "Loon Hsing" were Keras (Panama) S.A. The ships were sold to the owners by Lord Steamship Co. S.A. Panama under bills of sale but immediately afterwards the owners entered into bareboat lease agreement with Lord Steamship Co. S.A. (Panama) in respect of the two ships. The "Loon Chong" was, as a result of the claim by the respondents, arrested but later released on bail. The appellants applied for an order to set aside the writ on the ground that the action *in rem* was not maintainable against the appellants as the owners of the "Loon Chong". Arulanandom J. held that the bareboat lease agreement was not a lease but a mortgage under a guise of a lease and he accordingly dismissed the application. The appellants appealed.

Held: the ship in this case was leased to Lord Steamship Co. S.A. (Panama) under the bareboat lease agreement and as the agreement did not confer beneficial ownership in respect of the shares in the ship within the meaning of section 3(4) of the United Kingdom Administration of Justice Act, 1956, Lord Steamship Co. S.A. (Panama) did not have legal or equitable ownership of the ship but only possession and control. The action *in rem* was therefore not maintainable against the ship.

Cases referred to:-

(1) *The "Pangkalan Susu/Permina 3001"* [1977] 2 M.L.J. 129.

(2) *The "Permina 1017"* [1977] 2 M.L.J. 185.

(3) *The "I Congresso Del Partido"* [1977] 1 Lloyd's L.R. 536; [1980] 1 Lloyd's L.R. 23 (C.A.); [1981] 2 Lloyd's L.R. 367 (H.L.).

(4) *The Aventicum* [1978] 1 Lloyd's L.R. 184.

FEDERAL COURT.

C. Abraham for the appellants.

N.T. Vello (*P. Navaratnam* with him) for the respondents.

Cur. Adv. Vult.